

DUTY, NEGLIGENCE AND CAUSATION

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Mr. Imp acts carelessly and Mr. Angel is seriously injured. Imp is a wrongdoer who acted without due consideration for the safety of others—he is negligent. Angel has suffered bodily injury—a kind of damage which is often compensable in tort actions. But suppose that an average person would have trouble in deciding whether or not Imp, despite his blameworthiness, is to blame *for* Angel's injury. When an average person would entertain such a doubt courts, too, are likely to be bothered. The roots of doubt may lie in one (or both) of two kinds of soil:

(1) There may be doubt that Imp's wrongdoing actually caused Angel's injury—the injury may not be a consequence of the wrongdoing. Such a doubt raises an issue of cause-in-fact which is settled by weighing proof.

(2) Even though Angel's injury is, in fact, a consequence of Imp's acts, a doubt that Imp is to blame for Angel's injury may still persist. Such a doubt cannot be resolved by proof, for connection between the wrong and the injury is understood from every point of view but the legal. The issue is solved by deciding the proper limits of liability. Such an issue has been formulated by courts in three alternative forms: (a) was Imp under a duty *to Angel* to avoid injuring him as he did? (b) was Imp negligent *toward Angel*? (c) was Imp's wrong the proximate cause of Angel's injury? The differences between these three formulations are largely verbal, but a choice of one, rather than another, sometimes affects decisions.

I. ACTUAL CAUSE—PROOF PROBLEMS

The tort plaintiff normally has the burden of proving that the defendant's wrong is a cause in fact of his injury. Counsel who have recognized actual cause problems usually try to get a preliminary understanding of the connection (or lack of it) between the defendant's conduct and the plaintiff's damages without too much thought on

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strategy. After the advocate begins to understand the facts he starts planning proof. The reader of reported cases can seldom retrace the process and learn why one program of proof, rather than some other, was adopted. A check list of methods of establishing (and disproving) actual cause and a discussion of some of their practical implications may be useful.

Eyewitnesses. The testimony of an eyewitness may foreclose a dispute on causation. If a credible and credited witness saw a motorist run over a pedestrian who was then carted off to the hospital with a broken leg, defense counsel is likely to concede the causal relation between the accident and the injury. If the pedestrian can find no eyewitness he may have difficulty in identifying the motorist who ran over him. A defendant's eyewitness may be able to testify that the motorist who ran over the pedestrian was not the defendant.

Expert testimony. Sometimes the need for expert testimony is patent. Mr. Patient dies in Dr. Exodontist's dental chair while taking gas to escape the pain of a tooth extraction. Plaintiff's medical experts testify that the cause of death was asphyxia; defendant's experts testify that Patient died of heart failure unrelated to the administration of gas. Such a causation issue will be decided by the jury after each counsel has tried to persuade the jurors that his experts are the more credible.

A claimant's failure to adduce expert testimony may be fatal. In *Christensen v. Northern States Power Co.*¹ a lake owner proved that his lake was well-stocked in the autumn but contained no fish in the spring. He proved a power company's 66,000 volt line was supported by a tower resting on the lake bed; in mid-winter ice pressure tipped the tower and current was grounded for four seconds. The lake owner introduced no expert testimony to show that his fish were electrocuted, and lost his case. That high voltage electricity destroys life is common knowledge; but it is not commonly known—if it is true in fact at all—that electricity grounded in a large lake charges all of its waters.

Commonly believed misinformation is sometimes disproved by the defendant's experts. In *Western Telephone Corp. v. McCann*² the plaintiff's decedent was struck by lightning and killed on her front porch. The telephone company was charged with negligently failing to dismantle an abandoned drop line which ran from its trunk lines into decedent's house. Lightning struck a pole some distance from the house. Plaintiff's theory was that lightning traveled along de-

1. 222 Minn. 474, 25 N.W.2d 659 (1946).

2. 128 Tex. 582, 99 S.W.2d 895 (1937).

fendant's lines to the drop line and then along the drop line until it was close to decedent. The telephone company's four lightning experts gave convincing testimony that lightning, unlike ordinary electricity, is not likely to follow metallic conductors. The court held that the company was entitled to a directed verdict.

Circumstantial evidence. In all cases and on all issues the fact trier draws some inferences. Normally the process goes on without special notice, but in some cases circumstantial qualities of proof are spectacular. Particularly may this be so in the trial of some causation issues. In *Paine v. Gamble Stores*³ plaintiff proved that her husband left home one afternoon and was found dead the following morning at the bottom of a stair well affording entrance to a store basement. The stair well abutted on a public alley. It was originally guarded by a two-pipe railing, but the top rail guarding the deep end had been missing for some time. Plaintiff's counsel was faced with the problem of proving: (1) decedent's entry was over the improperly guarded end, and not over the properly guarded side or through the gate at the head of the stairs; and (2) decedent was not pushed, but fell, into the well. (Plaintiff did not have the burden of coming forward with evidence that decedent was free from contributory negligence in this jurisdiction.)

Proof which tended to show entry over the unguarded end was: the position and condition of the body were consistent with a fall over the end; prongs of deceased's ring setting were scratched, and a fresh scratch on the end wall matched spacing of the prongs; undisturbed dust and rubbish on the steps was inconsistent with a fall down them. Proof which tended to show that decedent was not pushed into the well was: his body showed no marks of violence other than a broken neck, which apparently resulted from the fall; no signs of struggle near the stair well could be found. This evidence was held sufficient to support a verdict for the plaintiff.

Preparation of such a case is virtually detective work. Fortunately for this plaintiff the body was found by policemen who made a thorough investigation before the site was disturbed and who could be called to testify.

Sometimes past history of the site yields circumstantial proof of causation. In *Hoyt v. Jeffers*⁴ a property owner claimed that a wood worker's failure to equip his saw mill with a proper spark arrester resulted in the burning of plaintiff's adjoining property. The property owner could find no eyewitness who saw sparks travel from the saw

3. 202 Minn. 462, 279 N.W. 257 (1938).

4. 30 Mich. 181 (1874).

mill stack to his building, but he did prove that the mill stack emitted sparks constantly and that these sparks had started other prior fires. This proof was held admissible and adequate to support a verdict for the plaintiff.

II. SUFFICIENT CONNECTION IN LAW—THE QUESTION

Mr. Engineer drives X Railroad's locomotive. He does not keep a proper lookout, runs his train into an obstruction, and wrecks it. Tank cars overturn and spilled oil catches fire. This flaming oil flows down a hill and into a stream which carries it for a mile. Dry grasses on down-stream banks are then ignited, and fire spreads to Mr. Farmer's barn a quarter of a mile from the stream. Farmer brings a damage suit against the railroad for loss of his barn and proves all of these facts. Even though these facts are fully established, nevertheless this question remains: Is Engineer to blame for Farmer's loss? That Engineer is blameworthy is clear—he failed to keep a proper lookout. That damage to the barn is, in fact, a consequence of his negligence is clear—at least in the sense that the barn would not have been destroyed had Engineer watched where he was going. The facts are understood from every point of view but the legal—experts on railroading, chemistry of oil, the law of gravity, spread of fire, wind, behavior of streams, etc., have nothing to add. The problem is whether or not liability for Engineer's negligence extends to Farmer's loss. Substantially similar facts have been established in two cases. In *Hoag v. Lake Shore & Mich. So. R. R.*⁵ a Pennsylvania court directed a verdict in favor of the railroad. Three years later in New Jersey in *Kuhn v. Jewett*⁶ the property owner recovered. If the question were one of actual cause, science could tell which of these results is correct. But science has not dealt with the proper extent of legal liabilities and has supplied no answers to this kind of question. Only the law can furnish criteria for judging such cases.

The three legal concepts used in formulating questions of extent of liability are (a) duty, (b) negligence, and (c) proximate cause. Three alternative formulations for the assumed case are:

(a) Duty. Engineer had a duty to keep a reasonable lookout. To whom does this duty flow? Certainly to passengers and fellow trainmen, to shippers whose chattels were on his train, and to his employer. Perhaps he owes this duty to owners of property close to the right of way, whose property is likely to be damaged if he com-

5. 85 Pa. 293 (1877).

6. 32 N.J. Eq. 647 (1880).

mits a breach. But does he owe the duty to owners of property outside of the normal zone of risk of damage from breach—owners whose damages are the consequence of a number of coincidences which happen to link up with Engineer's negligence? Should not the duty extend to owners of property in the neighborhood even though insignificant details of the accident are somewhat unusual, and even though the fire does spread a little further than should be expected?

(b) Negligence. Engineer was negligent. But negligent toward whom? Surely he was negligent toward those who were likely to be injured by his misconduct. But was he negligent toward Farmer whose property was not likely to be injured by his misconduct over a mile away? Should Engineer be permitted to say that since those more likely to be injured miraculously escaped injury he was not negligent toward Farmer whose property was relatively close by?

(c) Proximate Cause. Farmer's loss was a consequence in fact of Engineer's negligence. But liability must end somewhere short of liability for all damage caused. Was Engineer's negligence a cause legally too remote for liability, or was it a sufficiently proximate cause? Was Engineer's negligence—which is admittedly a cause in fact of Farmer's loss—a cause in law, a legal cause, of the injury?

Once any of these questions is answered the problem of extent of liability is determined. Before discussion turns to the way in which such answers are reached, clarity may be served in identifying the kinds of cases in which such questions are crucial. Most cases in which an extent of liability problem (the blame *for* problem) is still troublesome, even after the facts are known, fall into one of the two following classes:

(1) Cases in which, even though the plaintiff's injury is in fact an aftermath or consequence of the defendant's wrong, the connection between the wrong and the injury is fortuitous—cases in which the outcome of the defendant's misconduct persistently seems peculiar or unique. The common sense form of the question raised by these cases is: is the defendant to blame *for* such a consequence, or is the injury just an accidental upshot of the defendant's misconduct for which he should not be held? When injuries are routine this question is not raised. If a motorist negligently runs down a careful pedestrian and breaks his leg, which mends in the ordinary way, no one would doubt that the break, resultant routine medical and hospital expenses, loss of time at an ordinary occupation, and typical mental pain and suffering are all within the proper ambit of responsibility.

(2) Cases in which the plaintiff's injury is the aftermath of both the defendant's wrong and some other force, such as the misconduct of a third person or a malevolent turn of nature. The other force competes with the defendant's wrong for authorship of the plaintiff's harm. Of course a wrongdoing defendant is not necessarily relieved from responsibility even though someone else (or something else) is responsible—both may be responsible. But sometimes the overwhelming impact of the responsibility of some other force eclipses the defendant's contribution. The common sense form of the question raised by these cases is: is the defendant at least partially to blame *for* this injury, or is the other antecedent to be adjudged solely responsible for it? In these cases even though the defendant's wrong fortuitously sets the stage for some other antecedent (which might have been harmless had the defendant not misbehaved) yet defendant's part in the misadventure may—or may not—pale into insignificance.

These two described classes of cases are not mutually exclusive; some cases fall into both classes. The classification is only a descriptive aid in identifying scope-of-liability problems; it is of no help in solving them. Since such problems call for a determination of legal consequence, the lawyer naturally turns to rules of law for solutions.

III. IS THE DEFENDANT LIABLE FOR UNFORESEEABLE CONSEQUENCES?

Some few courts have said that once the defendant is shown to be a wrongdoer he cannot escape liability for consequent damage merely on the ground that such an injury could not be anticipated. Perhaps the two jurisdictions in which this view was stated most vigorously are England⁷ and Minnesota.⁸ The courts of both of these jurisdictions have had trouble in maintaining this position consistently, for reasons to be discussed later. Most courts frankly admit that foreseeability in some sense has some bearing on the ambit of some liabilities. In the famous *Palsgraf* case, in which the plaintiff was denied a recovery on the ground that the defendant's behavior was not breach of a duty owed to the plaintiff and the defendant's negligence was not negligence toward her, Cardozo said (subject to some exceptions), "The risk reasonably to be perceived defines the duty to be obeyed."⁹ In many jurisdictions the courts are firmly of the view that foreseeability of the injury is normally prerequisite to

7. See *Smith v. London & Southwestern Ry.*, L.R. 6 C.P. 14 (1870); *In re Polemis*, [1921] 3 K.B. 560.

8. See *Christianson v. Chicago, St. P.M. & O. Ry.*, 67 Minn. 94, 69 N.W. 640 (1896).

9. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

liability. Particularly is this so in courts that call the problem "proximate cause" and follow the rule: a negligent defendant is liable only for natural and probable consequences of his wrong. This rule is interpreted to mean that the defendant is liable only for foreseeable consequences.

All courts—even those which hold a negligent defendant liable for unforeseeable injuries—usually hold that when a reasonable man in the defendant's position could foresee *no harm to anybody* the defendant is not *negligent*. Only when injury to someone could have been anticipated by a reasonable man in the defendant's position is the defendant negligent. If his conduct was not likely to injure anyone then usually his conduct is not wrongful, and should not be discouraged. But a defendant may be negligent even though a reasonable man acting in similar circumstances could not foresee *with great particularity* the harms likely to flow from the defendant's misconduct. Motor travel at excessive speed causes a variety of accidents, injuries, and damages. Without foreknowledge of the exact harm he may do, the reasonable man recognizes the unjustifiable danger of excessive speed. Excessive speed is a criminal wrong even though it happens to cause no injury.

In a sense, then, a dispute on whether or not the defendant was negligent can be (and often is) settled before a question involving the ambit of liability for negligent conduct is considered. Mr. Iceman leaves his horse Dobbin unhitched at the curb while he is making a delivery. Dobbin runs away and carries the ice truck through Mr. Gardener's truck farm destroying crops. The issue—"Did Iceman act as a reasonably prudent man in leaving Dobbin unhitched?"—can be decided prior to (and without reference to) consideration of Iceman's liability for Gardener's unusual injuries. If Iceman is not at fault, and therefore would be liable for no kind of injury, then, of course, he is not liable for Gardener's damages. If Iceman is at fault, then the problem of whether or not he should be liable for the injury suffered can be raised and settled. Such a procedure is actually followed—at least in theory—in many courts. The negligence issue entails the problem of scope of liability only when it is differently formulated. When it is put in the form "Was Iceman negligent toward Gardener?" then the issue entails not only decision of whether or not Iceman's conduct merits discouragement, but also decision of whether or not the ambit of Iceman's responsibility includes the injuries to truck gardens.

When the defendant's conduct is unlikely to result in harm to anyone discussion of the ambit of his non-existent liability is confusing

and almost senseless. In *Aune v. Oregon Trunk Ry.* a railroad "spotted" unlocked, empty freight cars on a siding next to a warehouse. Hoboes camped in a car and started a fire which spread to the warehouse. The court decided that these facts did not constitute a cause of action against the railroad. The court properly said, "None of the acts alleged in the complaint was negligent or wrongful." This statement sufficiently disposes of the case, and it could have been developed only by a discussion of the unlikelihood of any injury resulting from the railroad's acts. The important idea is that the conduct was not dangerous, and therefore was not conduct from which a reasonable railroad would have abstained. But the court went on to say, "Moreover, if the acts of the defendant were negligent as contended for, they were too remote and not the proximate cause of the injury."¹⁰ The court wrote variations on this theme for four columns of the *Pacific Reporter*. Of course when no kind of damage to anyone is foreseeable, the particular damage that results is unforeseeable. But the dismissal of the *Aune* case is properly justified on the ground that the railroad was not at fault, rather than on the ground that if the railroad were at fault this is not the kind of result for which it would be responsible. The abstract assumption of the railroad's fault without specifying what constituted its fault makes the discussion of the ambit of responsibility meaningless. If it is not known in what way a defendant is blameworthy, it is almost impossible to discuss whether or not he is to blame for a particular consequence of his misbehavior.

Once misconduct causes damage the specific accident has happened in a particular way and has resulted in a discrete harm. When, after the event, the question is asked—"were the particular accident and the resulting damages foreseeable?"—the cases fall into three classes:

(1) In some cases damages resulting from misconduct are so typical that it is impossible to convince judges and jurors that they were unforeseeable. If Mr. Builder negligently drops a brick on Mr. Pedestrian, who is passing the urban site of a house under construction, even though the dent in Pedestrian's skull is microscopically unique in pattern, Builder could not sensibly maintain that the bashed-in skull was an unforeseeable consequence.

(2) In some cases the freakishness of the facts refuses to be downed, and any description that minimizes it is viewed as misdescription. For example, in a recent Louisiana case¹¹ the defendant-trucker negligently left his truck on the highway at night without setting out flares. A car crashed into the truck and caught fire.

10. 151 Ore. 622, 628, 51 P.2d 663, 665, 666 (1935).

11. *Lynch v. Fisher*, 34 So.2d 513 (La. App. 1948).

The plaintiff came to the rescue of the car occupants—a man and wife. After the rescuer got them out of the car he returned to the car to get a floor mat to pillow the injured wife's head. A pistol lay on the mat rescuer wanted to use. He picked it up and handed it to the husband. The accident had, unbeknownst to the rescuer, temporarily deranged the husband, and he shot rescuer in the leg. Such a consequence of negligently failing to guard a truck with flares is so unarguably unforeseeable that no judge or juror would be likely to hold otherwise. (Incidentally, the Louisiana court held the trucker liable to the rescuer on the ground that foreseeability is not a requisite of liability.)

(3) Between these extremes are cases in which the consequences are neither typical nor wildly freakish. In these cases unusual details are arguably—but only arguably—significant. If they are held to be significant, then the consequences are unforeseeable; if they are held to be insignificant then the consequences are foreseeable. For example, in a Texas case two men were sent out on a service truck to tow a stalled car. One of them, the plaintiff, made the tow rope fast and tried to step from between the vehicles as the truck started. His artificial leg slipped into a mud hole in the road, which would not have been there had defendant-railroad not disregarded its statutory duty to maintain this portion of the highway. He was unable to extricate his peg-leg, and was in danger of being run over by the stalled car. He grabbed the tail gate of the service truck to use its forward force to pull him out of the mud. A loop in the tow rope lassoed his good leg, tightened, and broke it. As long as these details are considered significant facts of the case the accident is unforeseeable. No doubt some judges would stress them and so hold. As a matter of fact the Texas courts have on occasion ruled that much less freakish injuries were unforeseeable. But in the peg-leg case the court quoted with approval the plaintiff's lawyer's "description" of the "facts" which was couched in these words: "The case stated in the briefest form, is simply this: Appellee was on the highway, using it in a lawful manner, and slipped into this hole, created by appellant's negligence, and was injured in undertaking to extricate himself." The court also adopted the injured man's answer to the railroad's attempt to stress unusual details:

"Appellant contends: it could not reasonably have been foreseen that slipping into this hole would have caused the appellee to have become entangled in a rope, and the moving truck, with such dire results. The answer is plain: The exact consequences do not have to be foreseen."¹²

12. *Hines v. Morrow*, 236 SW. 183, 187, 188 (Tex. Civ. App. 1922).

In this third class of cases foreseeability can be determined only after the significant facts have been described. If the official description of facts adopted by the court is detailed, the accident is called unforeseeable; if it is general, the accident is called foreseeable. Since there is no authoritative guide to the proper way to describe facts, the process of holding a loss is—or is not—foreseeable is most fluid, begging attempts at accurate prediction.

This third class of cases includes most, but not quite all, of the arguable cases on the scope of liability. Cases which fall in the first class—in which the resulting damages are so typical that arguments of unforeseeability sound nonsensical—are almost invariably decided for the plaintiff. Cases which fall in the second class—in which the utter freakishness of the coincidental connection between the defendant's wrongdoing and the plaintiff's injury refuses to be suppressed—are almost invariably decided for the defendant (except in those jurisdictions which try to rule out foreseeability as a requirement of liability; even in those jurisdictions most of the wildly freakish cases are decided against the plaintiff on other grounds). The arguable cases fall in class three, in which the foreseeability requirement cannot function as a "test." In these cases advocates and judges can and do state logical and acceptable analyses of either foreseeability or unforeseeability.

Even though foreseeability of the injury will not function as a *test* of the scope of liability, nevertheless the idea that responsibility should be limited to foreseeable consequences is properly potent—an idea that will continue to influence decisions and demand respect. Close problems on the scope of liability-*for*-fault call for judgments on whether the defendant is to blame *for* the plaintiff's injury. Those who make such a judgment—regardless of what doctrines or rules they purport to use—tend to view the freak injury as the workings of malevolent fate, rather than as injuries responsibly caused by the wrongdoer's misconduct. A plaintiff, therefore, is likely to dispose judges and jurors in his favor if he can persuade them that unusual aspects of the case are insignificant details. On the other hand, a defendant may induce psychological support for his position if he can convince judges and jurors that freakish details are a prominent and significant part of the case. Such advocacy is a fine art. Counsel who overdoes it strengthens, rather than weakens, his opponent. If plaintiff's lawyer insists on too general a description, he appears to be trying to suppress important facts; if defense counsel insists on too specific a description, he appears to be taking advantage of mere technicality.

Foreseeability will not be downed as an important fact in the eyes of the courts. The English and Minnesota courts expressly ruled that once fault is established the claimant may recover for unforeseeable consequences of that fault; but the psychological pressure to dismiss the freak claim is so strong that in both of these jurisdictions the courts have back-tracked, at least in part. The details of these retreats are complicated, and the extent of these retreats is not yet clear. The story has been told elsewhere, if the reader cares to read it.¹³

Yet there are some kinds of cases in which even the most unforeseeable damage constitutes an injury for which, to the minds of ordinary men, the defendant is to blame and for which the defendant is almost sure to be held legally liable. In *Wyant v. Crouse*¹⁴ an impudent interloper entered a blacksmith shop and used it. He was not negligent in any way, but nevertheless, as a consequence of his use, the shop burned down. He was held liable for the property destroyed. Even though proper use of a blacksmith shop was not likely to destroy it, the liability of the interloper hardly seems arguable.

The point may be strengthened by this hypothetical case: Mr. Stronghead appropriates a car knowing that the owner would probably not lend it to him. His route of travel takes him past a circus parade. An elephant gets out of hand, sits on the hood of the car, and squashes it. Stronghead returns the car to its owner, who accepts it and sues him for damages. What kind of injury could be more unlikely? Yet Stronghead's liability is clear. When one usurps the use of property of another, in common judgment the usurper is to blame for damage that results from his use, regardless of how outlandish it might be. Judges probably will share this generally accepted view.

Judges do not react to all problems of the proper extent of liability as though they were laymen. After all, they are trained as legalists and their training has some effect on their reactions. In *Stevenson v. East Ohio Gas Co.*¹⁵ a workman brought an action against a defendant who negligently set a fire which damaged the factory in which plaintiff worked. The factory closed down for repairs for eight days and the workman lost over \$100 in wages. The defendant's liability to the factory owner was clear. Now since the defendant was to blame for the damage to the factory, and since the manufacturer could recover damages for the loss of its use for eight

13. On the English developments, see 17 U. OF CHI. L. REV. 379 (1950). On the Minnesota developments, see Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185, 196-8 (1950), reprinted in MORRIS, *STUDIES IN THE LAW OF TORTS* 259-61 (1952).

14. 127 Mich. 158, 86 N.W. 527 (1901).

15. 47 Ohio L. Abs. 586, 73 N.E.2d 200 (1946).

days, clearly the defendant was also to blame for the workman's loss of eight days time. If the damage to the factory owner because of close-down could be foreseen, the damage because of close-down to employes could also be foreseen. But the claim was a novel one and the judges knew it was novel. They also knew that others besides the workman who had dealings with the factory had probably suffered because of the interruption. Judgeliike, they worried about where they could stop if they recognized this novel claim, and held against the workmen. Perhaps a feeling that unemployment insurance, rather than tort liability, should deal with this kind of problem had something to do with this particular decision. At least some untutored minds would reach a contrary result if asked whether the fire setter was to blame for the workman's loss.

IV. THE STATUTORY PURPOSE RULE

In *Gorris v. Scott*¹⁶ sheep carried on the deck of a ship were washed overboard and lost. The shipper sued the carrier and sought to establish negligence by reference to the Contagious Diseases Act, which carried criminal penalties for transporting sheep without supplying pens and footholds. The carrier's violation of the act was clear—he was guilty of negligence per se. Nevertheless, the court held for the carrier on the ground that the injuries were not of the type the statute was designed to prevent.

In *Kelly v. Henry Muhs Co.*¹⁷ a fireman fell down an unguarded elevator shaft while battling flames in a factory. At common law firemen engaged in fighting fires are classified as entrants by license; the occupant of the burning building owes them no duty of proper maintenance. This plaintiff-fireman sought to establish the occupant's duty to guard the elevator shaft by referring to a *labor* statute which carried criminal penalties for failures to guard elevator shafts in factories. The manufacturer's violation of this statute was clear, and he was guilty of negligence per se. Nevertheless, the court ruled in his favor on the ground that the purpose of the statute was to protect factory workers and the fireman was not within the class of persons the statute was designed to protect.

These two holdings are applications of a rule which may be stated in this way: A plaintiff may not claim that the breach of a statute is negligence toward him unless (a) he is within the class of persons the statute was designed to protect, and (b) his injury was within the class of injuries the statute was designed to prevent.

16. L.R. 9 Ex. 125 (1874).

17. 71 N.J.L. 358, 59 Atl. 23 (1904).

The rule is treated with respect by virtually all courts.¹⁸ Nevertheless the basis for it is difficult to understand. Criminal statutes in which tort liability is not mentioned do not purport to change civil law. Criminal statutes affect civil liability through tort judges' respect for legislative judgment, rather than through tort judges' obedience to legislative command. Mr. Iceman breaks a criminal statute; he leaves his horse, Dobbin, unhitched while he carries a chunk of ice into a customer's house. Dobbin runs away and knocks down Mr. Pedestrian. Respectfully borrowing the criminal proscription as a measure of reasonable prudence, a judge rules that Iceman's breach of the criminal law is negligence per se. Mr. Motorist drives carefully, but nevertheless runs down Mr. Walker. Motorist then breaks the criminal hit-and-run statute, and as a result Walker suffers from exposure. Prompted by his respect for legislative judgment to re-examine and reject the common law immunity of those who fail to render aid in such circumstances, a judge holds Motorist is liable for the exposure injuries. In these hypothetical cases the legislature has considered problems akin to those raised in the civil trial. But in *Gorris v. Scott* (the sheep case) and *Kelly v. Henry Muhs Co.* (the fireman case) the legislature has not considered any problem remotely like that decided by the court—both defendants were guilty of criminal misconduct. Yet each defendant escaped civil liability by "reference" to criminal statutes which they had clearly broken! Surely this result cannot be rationalized as respect for, or help from, the legislature; the most that can be said is that the legislature was not concerned with the problems raised.

It so happens that the holding in the sheep case may be justifiable. If the only function of pens and footholds is to keep disease from spreading, the carrier may properly be relieved from liability for an "unforeseeable" kind of injury. The same cannot be said for the fireman case. The manufacturer was guilty of serious misconduct. Someone was likely to fall down his unfenced elevator shaft, and someone did. The manufacturer was clearly to blame for the fireman's injury. But the fireman was faced with the threat that a common law landowner's immunity would relieve the manufacturer from liability to him. The legislature had challenged the wisdom of unguarded elevator shafts, but happened to do so with the safety of workmen in mind. The danger to any firemen who happened to enter to fight fire was as great as—if not greater than—the danger to employes. The danger was known to the manufacturer; feasible safeguards were readily avail-

18. The only case that I have been able to find in which the rule was expressly rejected is *Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387 (1896)—a case which probably has been forgotten even in Alabama.

able. The accident is no freak. Yet the fireman finds himself barred by the common law immunity if he does not rely on the statute, and the statutory purpose rule if he does.

The opposite result was reached in *Hyde v. Maison Hortense*.¹⁹ A customer of a tenant in search of a toilet fell down an unfenced elevator shaft and brought an action for injuries against the landlord. At common law the customer would be barred by a similar immunity—the immunity that protects landlords from liability for patent defects in the condition of the leased premises. The legislature had adopted a *labor* law carrying criminal penalties for landlords who leave elevator shafts unguarded in this kind of building. The court held that the breach of statute resulted in the landlord's liability to his customer's tenant. The result is utterly inconsistent with the statutory purpose rule. But the court does not expressly repudiate the rule; the court does not mention it.

"Intention of the legislature" is not the crispest of concepts. Some courts find "intentions" to protect classes of persons or prevent classes of injuries that have never crossed legislators' minds, and thus foil the restrictive effect of the statutory purpose rule. In *La Point v. Hudgins Transfer Co.*²⁰ a teamster broke a criminal ordinance by leaving his horses unhitched near a sidewalk. One of the horses stepped on the sidewalk, bit, and knocked down a passerby. The teamster plausibly but vainly contended that the only purpose of the ordinance was to prevent runaways and resulting traffic accidents. The appellate court found that one of the legislative purposes was to protect pedestrians from injuries like the plaintiff's. Perhaps the holding the court wished to reach had something to do with its discernment of this well-hidden intention of the legislature.

All plaintiffs do not fare so well. In *Mansfield v. Wagner Electric Mfg. Co.*²¹ a workman was injured when a particle from an unhooded emery wheel got into his eye. A criminal statute penalized the use of emery wheels unless they were equipped with a hood and blower sufficient "to carry off dust and prevent its inhalation." The court found a legislative purpose to prevent only respiratory injuries, and therefore held the employer was not liable even though compliance would have prevented the injury that occurred.

The statutory purpose rule limits civil liability to foreseeable harms. The pre-vision required, however, is the pre-vision of the legislature, rather than that of a reasonably prudent man situated as was the

19. 132 Misc. 399, 229 N.Y. Supp. 666 (Sup. Ct. 1928).

20. 48 N.D. 1032, 188 N.W. 166 (1922).

21. 294 Mo. 235, 242 S.W. 400 (1922).

defendant. The legislature's pre-vision is gathered from the words of the statute, judicially construed. When a legislature focuses either on one risk inherent in dangerous conduct or on the protection of one class of persons, it often passes a criminal statute without bothering about other risks inhering in that kind of conduct or other classes of persons imperilled by that conduct. Since misconduct is criminally punishable even though no one is injured, enforcement of the criminal law will tend to eliminate other risks and protect other classes of persons, and is in no way hampered by the setting in which the legislature happened to consider the problem. But the judicially invented statutory purpose doctrine can produce highly restrictive and somewhat irrational limitation on civil liability flowing from breach. The blame for such irrational restriction lies with the courts, rather than the legislature, for the legislature has not dealt with the scope of civil responsibility, nor intended that the criminal statute be put to any such use.

When the legislature happens to evince no concern for a particular class of people or a special kind of harm, the legislature's foreseeability will not differ from that of a reasonably prudent man in the defendant's position. Then only a freak accident will call the statutory purpose rule into play. In *Larrimore v. American National Insurance Co.*²² phosphorous rat poison was set out in a restaurant; it exploded when a waitress lighted a nearby gas burner. A criminal statute forbade the setting out of poison except in a safe place. The phosphorous poison probably was not put where it was likely to get into food or be eaten by mistake. But suppose that it was—that the restaurateur clearly ran a risk of poisoning some of his patrons and therefore clearly broke the statute. The waitress did not prove the restaurateur had had any reason to suspect that the poison was inflammable or explosive. In this assumed case the restaurateur is at fault, and the waitress is injured as a result of his misconduct. But the accident is freakish. The question—"Did the legislature intend to prevent such accidents as this?"—raises the same inquiry as "Would a reasonable man in the defendant's position have foreseen such an accident as this?" The identity of the two questions results from posited reasonableness of the legislature in dealing with the problem of proper care in setting out poisons—the same reasonableness as that attributed to a reasonable man in the defendant's position. The court in the *Larrimore* case said that the legislature did not intend to prevent such accidents as this one. It is not surprising that the court also said that the restaurateur's negligence was not the proximate cause of the waitress' injury after defining proximate cause in terms of foreseeability.

22. 184 Okla. 614, 89 P.2d 340 (1939).

The point is this: When a legislature displays no specially restrictive interest in condemning dangerous conduct in a criminal statute, the statutory purpose rule is a foreseeability requirement. In these cases the statutory purpose rule has virtually the same justifications, the same psychological impact, the same disadvantages and limitations, and calls for the same sort of advocacy as other foreseeability doctrines previously discussed. One slight difference may affect the outcome of some cases. The statutory purpose rule requires that the plaintiff be within the *class* of persons the legislature intended to protect and that the injury be within the *class* of injuries the legislature intended to prevent. Sometimes the foreseeability requirement is stated in this way: The defendant is liable only if a reasonable man could foresee the likelihood of *the* injury that happened. No specific injury is ever foreseeable in every detail, and all courts which hold foreseeability pre-requisite to liability, at some time or other, say that the injury need not be foreseen in exact detail. If an injury need not be foreseen in exact detail, then only a *kind* of injury to a *kind* of person injured must be foreseeable. *Kind* is after all a synonym for *class*. Nevertheless the proposition that the injury need not be foreseen in exact detail is only an ancillary rule—one that need not be (and is not) stated every time the foreseeability requirement is mentioned. Courts sometimes emphasize fairly specific details of a specific injury and hold it unforeseeable. These same courts might well have reached the opposite result in many cases if the problem were phrased in terms of foreseeable *classes* of injuries to foreseeable *classes* of persons happening in a foreseeable *kind* of way.

V. "CLASS FORESEEABILITY" WHEN NO STATUTE IS INVOLVED

Modern analysts have often espoused criteria resembling the statutory purpose rule. They reason that no negligent act threatens all imaginable harms; unreasonably dangerous conduct is dangerous because it threatens particular kinds of harms to particular kinds of persons in particular ways; responsibility should follow the pattern of the risk. Dynamite stored in a teeming urban center creates unreasonable risk of explosion that may destroy nearby life, limb, and property; it is no threat to female chastity; the storer should not be responsible if the nightwatchman guarding it happens to seduce a woman living in the neighborhood.

Limitation of liability to the pattern of risk can be expressed either in terms of duty (the risks to be perceived delimit the duty of care), negligence (negligence must be judged in terms of the risk involved), or proximate cause (only foreseeable injuries are proximately caused,

but they need not be foreseeable in exact detail; the requirement is foreseeability in general form). All of these formulations limit liability in terms of the purposes served by discouraging the defendant's kind of misconduct.

Analysts who espouse these forms of analysis do not always agree on their application. In *Paris G.N.Ry. v. Stafford*²³ a trainman was killed by derailment. A switchstand was mounted on a single, decayed tie; it was so unstable that small force would dislodge it; had the railroad taken due care the switchstand would have been mounted on two sound ties. An automobile missed a curve on a nearby highway, travelled fifty feet from the roadway, across a ditch and up the railroad embankment, and collided with the switchstand. Spikes came out of the rotten tie and the switch was knocked into split-switch position sure to derail the next train that passed. One view taken on the case is this: The railroad's duty with respect to its ties was not to guard against *any such hazard*, and therefore the railroad is not liable for the trainman's death. Another view is phrased in these terms: The risk of accident from rotten ties, as that risk would be described before the trainman was killed, is a risk of derailment; a person describing that risk before the accident would not try to predict the exact force that would displace the spikes; since derailment did result from the railroad's negligence the railroad should be held responsible.

Why are both of these contradictory analyses available? Every accident is a specific accident. If it is not something of a freak no problem of extent of liability is likely to arise. If it is something of a freak an analyst who stresses its freakishness will conclude that it falls outside of the purpose generally served by condemning the kind of misconduct of which the defendant was guilty. If it is not too freakish, an analyst who minimizes unusual detail can conclude that it falls within the purpose generally served by condemning the kind of misconduct of which the defendant was guilty. There is neither authoritative pre-made classification of the pattern of the risk, nor authoritative guide to the proper description of the facts.

The basic problem in the decayed tie case is whether or not the railroad is to blame for the death of the trainman. The unusualness of the facts raises the problem, but does not solve it. Is this loss too unusual, too much of a freak, so much of a freak that the mismanaged railroad should escape responsibility? The problem is hard. Reasonable men can differ on it. The court that tried the case had to decide whether the railroad deserved a directed verdict; and held that it did.

23. 53 S.W.2d 1019 (Tex. Comm. A. 1932).

The opposite decision would have had as much *and as little* to be said for it.

VI. THE PROXIMATE CAUSE RULES

The courts until comparatively recently called most scope of liability problems problems of "proximate cause"; many courts still extensively use that phrase, and its opposite, "remote cause." Many judges and text writers have tried to frame rules or tests for distinguishing between proximate and remote causes. One of these rules has been discussed—the defendant's wrong is the proximate cause of the plaintiff's injury only if the injury is a natural and probable consequence (a foreseeable consequence) of the wrong. Other rules have received judicial approval and merit discussion.

The substantial factor rule. Professor Jeremiah Smith, one of the great tort teachers at the turn of the century, formulated this rule.²⁴ The test he proposed is, in substance, that a defendant's wrong is a proximate cause of an injury only if it was a substantial factor in producing that injury. Several courts purport to apply this rule, and the *Restatement of the Law of Torts* makes the substantial factor "test" its keystone formula for dealing with legal cause.

The rule throws little light on the problem. A factor in producing an injury is a cause of that injury. The relation of cause to consequences is, *in fact*, an all-or-none relationship—an event *in fact* either is a cause or is not a cause of another event. No event can be, *in fact*, an insubstantial cause of another event. The reference, then, of the word "substantial" is not factual. A cause that is substantial-in-fact can be insubstantial in law—a factual antecedent is not necessarily legally proximate. The reference of the word is to legal substantiality. Professor Smith's rule restated in light of this analysis becomes: A legally substantial cause is a proximate cause.

But since by definition only proximate causes are legally substantial, the test supplies only a new synonym for a troublesome legal concept. This synonym is put forward to solve difficulties not rooted in a lack of words, but rooted in a lack of understanding. Since the synonym is itself undefined it throws no new light on the nature of legal remoteness. When the question "Is this defendant to blame for this injury?" is hard to answer, no more help is got from the substantial factor "test" than from "proximate cause" used raw.

Illustration may make the difficulty clearer. Defendant Railroad carries a carload of goods to a rail center from which they should go

24. Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 223, 303 (1912).

forward over another line. Railroad negligently fails to turn the car over to the connecting carrier, and allows it to remain in the yards. The yards are ordinarily a safe place, but an unforeseeably disastrous flood sweeps down a nearby river, the yards are inundated, and the goods are damaged. Shipper sues the railroad for this damage. Railroad's negligence is clear; Shipper's damage is clear; proof that the car would have been forwarded to safety but for Railroad's negligence is clear. But is Railroad's negligence a substantial factor in producing the loss?

Argument for the affirmative: Since Shipper's goods would not have been damaged had it not been for Railroad's negligence, surely Railroad's negligence is a substantial factor in producing the loss. Argument for the negative: The concurrence of Railroad's negligence and the flood is mere coincidence—if the timing had been slightly different or if the delay had happened at similar but different place the goods would not have been damaged by flood waters.

Both of these arguments have the ring of validity. The substantial factor rule calls for one as much as for the other. When scope of risk problems are puzzling, the rule merely puts the question and does not supply an unequivocal answer. The draftsmen of the *Restatement* recognized this when they stated "the word 'substantial' is used to denote . . . the idea of responsibility."²⁵ Since the problems to be decided are scope of responsibility problems, a word that does no more than denote *the idea* of responsibility is of no great help; what is needed is words that will identify *cases* of responsibility.

Independent intervening force. Another approach to proximate cause is the attempt to distinguish between "independent intervening forces," which break the chain of causation, and mere "concurring causes," which do not. Some courts prefer "superseding cause" to "independent intervening force." Sometimes the courts attempt to draw the distinction between proximate causes and "mere conditions." These are legalistic approaches to the common sense problem, "Is defendant at least partially to blame *for* this consequence of his misconduct, or is this other person (or force) solely responsible for it?"

Two Massachusetts cases illustrate the impotency of this analysis to supply solutions. In *Fottler v. Mosely*²⁶ a stockbroker lied to a customer about certain sales of the stock of X Company and persuaded the customer to revoke an order to sell his stock in that company. Thereafter an officer of X Company absconded with \$100,000, and the customer's stock became worthless. The broker had nothing to do with

25. RESTATEMENT, TORTS §431, comment *a* (1934).

26. 185 Mass. 563, 70 N.E. 1040 (1904).

the defalcation. The court held that the trial judge should have charged the jury that the broker was liable. Even though the broker had no connection with or knowledge of the defalcation it was not an independent intervening force. In *Purchase v. Seelye* a railroad was responsible for a hernia contracted by one of its workmen. The workman engaged a surgeon to operate on him. In the operating room the surgeon mistook the workman for another patient with a different ailment, and performed the wrong operation. The workman sued the surgeon, who pleaded a release given by the workman to the railroad. This pleading raised the question of the liability of the railroad for the improper surgery, for if the railroad were liable for the improper surgery the release (under the peculiar law of releases) discharged both the railroad and the surgeon. The court held that the surgeon's mistake was a "wholly wrongful, independent and intervening cause for which the original wrongdoer [the railroad] was in no way responsible."²⁷

The point is not that the cases cannot be distinguished; deceit differs from negligent injury, and virtually none of the facts of these cases are the same. But the bare causal aspects of these two cases are identical. In each case the first wrongdoers (the broker and the railroad) were responsible for getting the plaintiffs (the customer and the workman) into positions in which the second wrongdoers (the absconder and the surgeon) had an opportunity to injure the plaintiffs. Therefore it can be argued that the first wrongdoers' misconduct concurred with the misconduct of the second wrongdoers in producing the harm. In each case the second wrongdoers acted, at the time of their misconduct, with complete independence. Therefore it can be argued that their misdeeds were independent intervening forces. In any case in which the conduct of two wrongdoers is related in this fashion "independence" or "concurrence" can be emphasized. Sometimes courts emphasize one; sometimes the other.

An attempt has been made to rid the independent intervening force "test" of its ambivalence by defining independent intervening forces as unforeseeable forces, and concurrent forces as foreseeable ones. This is the route by which Minnesota, which earlier excluded foreseeability as a test of proximate cause, returned to giving foreseeability importance. In *Robinson v. Butler*²⁸ a motorist overtook and passed another car in the face of nearby traffic coming from the opposite direction. He cut back into line so sharply that the passed car was forced onto the right-hand shoulder of the highway. A panicky front seat passenger in the passed car grabbed the steering wheel and pulled the

27. 231 Mass. 434, 437, 121 N.E. 413, 414 (1918).

28. 226 Minn. 491, 33 N.W.2d 821 (1942).

car back onto and across the road, where it collided with a telegraph pole. The court held the passenger's act was an intervening efficient cause which relieved the passing motorist from liability. The court justified this holding on the ground that the passenger's act was unforeseeable—that it was not the normal response to the situation created by the defendant, and was so extraordinary that it constituted an intervening efficient cause. Of course this form of foreseeability "test" is not less fluid than other forms of foreseeability "tests." If the accident is described a little more generally ("One who forces a car off the road at high speed travel can foresee that the occupants of that car may become panicky and fail to act with calm detachment"), the passenger's act could be put in a class of foreseeable events, and become a concurring, rather than an independent, cause.

VII. CERTAINTY OF THE LAW OF SCOPE OF LIABILITY

The *general rules* of proximate cause do not tend to make the law certain or the results of cases predictable. This uncertainty is not remedied when the problem is discussed in terms of duty or negligence. Experienced trial lawyers are accustomed to this uncertainty and take it into account as a peril of litigation and a factor affecting settlements.

Even though generalized legal analysis has not fostered certainty the outcome of borderline scope-of-liability cases is not always unpredictable. In some cases specialized rules and precedents lay a sound basis for prediction. In the following classes of cases the law has been settled by precedent or rule in some jurisdictions:

a. Defendant drives a vehicle or train in such a way that X is negligently imperiled. Plaintiff makes a reasonable attempt to rescue X, and is injured while doing so. The defendant is liable for typical injuries so caused.

b. Defendant negligently sets fire to plaintiff's property under such circumstances that he is liable for the loss of the property. Plaintiff makes a reasonable attempt to put out the fire and suffers burns while doing so. Most courts have held that the defendant is liable; in a few jurisdictions the defendant is not liable for the plaintiff's personal injuries.

c. Defendant wrongfully injures X, who worries about his health, becomes demented, and commits suicide. The defendant is not liable for X's death.

d. Defendant throws a missile at X or strikes at him under such circumstances that he would be liable to X for assault and battery if

he hits him. But the attack miscarries and the missile or blow lands on a bystander. Even though the defendant does not suspect the bystander's presence, defendant is liable for typical injuries. This kind of case falls under the "rule of transferred intent."

The list could be expanded to include hundreds of different kinds of cases in which the doctrine of *stare decisis* has tended to settle the law. But many cases that involve scope of liability problems are freak cases, unique and not ruled by cases closely in point. Common sense is the only guide to the likelihood that research will turn up valuable precedents or specialized rules. Some cases are so patently unusual that experienced counsel knows off-hand that he is unlikely to find authority closely in point. Other cases are likely to raise a question that has been decided before; protracted research is almost bound to turn up authority. Unusual cases do sometimes recur. In 1896 the Supreme Court of Texas decided a case in which a railroad received cattle for shipment and directed them to a pen entered through a gate with a defective latch; the shipper was trying to fasten the gate when the cattle were frightened, plunged through the gate and injured him. The railroad escaped liability.²⁹ Virtually the same facts recurred in 1931. The court saw no significant difference between the cases and decided the second case as it had the first—for the defendant.³⁰

Of course precedent and specialized rules are no more sacrosanct in this field than in any other; if they yield obviously unjust results they are likely to be repudiated. In *Vicars v. Wilcocks*³¹ the defendant slandered the plaintiff, and as a result his employer discharged the plaintiff in violation of the contract of employment. King's Bench held that since the plaintiff's master had done an intervening unlawful act the defendant was not liable for the loss. This case initiated a rule sometimes called "the last wrongdoer's rule," requiring an injured person to seek his recovery from the last of a series of wrongdoers. The result of the *Vicars* case is obviously unjust—even though the plaintiff's master was liable the slanderer was also to blame for plaintiff's loss. The rule in this inflexible form has been repudiated in virtually all jurisdictions. A similar fate has befallen a rule arbitrarily limiting the liability of one who negligently sets a fire. The Pennsylvania courts held at one time that liability extends only to the first building burned,³² but this inflexible rule was soon repudiated.³³

29. *Texas & Pacific Ry. v. Bigham*, 90 Tex. 223, 38 S.W. 162 (1896).

30. *Union Stockyards v. Peeler*, 37 S.W.2d 126 (Tex. Comm. A. 1931).

31. 8 East 1, 103 Eng. Rep. 244 (1806).

32. *Pennsylvania R.R. v. Kerr*, 62 Pa. 353 (1870).

33. *Pennsylvania R.R. v. Hope*, 80 Pa. 373 (1876).

VIII. CAUSE-IN-FACT RELATION AS A PREREQUISITE OF LIABILITY

When a central problem of proof is whether or not the defendant's conduct did in fact cause the plaintiff's loss, usually the defendant is clearly not to blame for the plaintiff's injury unless this issue is determined against him. When settled facts raise a scope of liability problem, usually the plaintiff's loss is in fact a consequence of the defendant's misconduct. Since these two types of cases nearly exhaust the field, it is almost accurate to say that unless a defendant's misconduct in fact causes a plaintiff's loss the defendant is not liable for the loss. But there are exceptions and qualifications. In *Summers v. Trice*³⁴ two of three hunting companions simultaneously and independently mistook the third for game and each fired at him. One pellet of shot hit him in the eye. The injured man could not prove which of his companions hit him, for the science of ballistics has not developed a technique for identifying the shot gun from which a pellet has been fired. The court had two alternatives: hold both or neither of these two trigger-happy hunters. It chose the former, the more sensible alternative. But one defendant's conduct did not in fact cause the injury.³⁵

The connection-in-fact between misconduct and harm arguably is not causal when two independent forces, each of which would have produced the whole injury alone, strike simultaneously or after merging. In the classic case of *Corey v. Havener*³⁶ two motorcyclists whizzed past and scared a horse with resulting injuries to the driver. The noise made by either cyclist would have caused the runaway. It cannot be said that the misconduct of either cyclist or of both of them caused the harm, because the harm would have happened if either were absent. It cannot be said that the misconduct of neither caused the

34. 33 Cal.2d 80, 199 P.2d 1 (1948).

35. In the similar case of *Oliver v. Miles*, 144 Miss. 852, 110 So. 666 (1927), the court reached the same result. But the plaintiff was a stranger to the hunting party and the court was able to dub the two hunters joint enterprisers, and thus justify on an agency theory the liability of the hunter who did not hit the plaintiff. The plaintiff in the *Summers* case was a member of the hunting party. If the defendants were liable for each other's wrongs as joint enterprisers, such a liability would run only to strangers to the enterprise, and not to another joint enterpriser. A related problem was dealt with as a problem of proof in *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944), a medical malpractice case in which the patient proved that while he was under an anaesthetic during an appendectomy he suffered a traumatic injury to his neck. Suit was brought against all of the attending medical people—doctors and nurses. Defendants contended that they were entitled to the nonsuit entered at the trial because, even though the plaintiff had circumstantially proved one of them was negligent, he nevertheless failed to prove which one, and none was liable for the others' torts. Nevertheless, the appellate court reversed and held that each defendant could escape liability only by affirmatively proving facts exonerating himself. Thus the penalty placed upon innocent defendants for silence or unconvincing proof of exoneration is liability for a harm not caused by them.

36. 182 Mass. 250, 65 N.E. 69 (1902).

harm, because the harm would not have happened if both were absent. All that can be said is that either was sufficient to cause the injury: the misconduct of each would have been the cause of harm if the other was absent, that is, if the facts were different from what they were. The court had no difficulty in holding both defendants liable. In spite of the difficulties that occur when the problem is phrased in terms of cause, obviously both were to blame for indivisible injuries and fell within the established legal category of co-tortfeasors.

But cases of simultaneous or merging forces are not always so simple. In *Cook v. Minneapolis, St. P. & S.S.M.Ry.*³⁷ two fires after merging swept over a landowner's property and did great damage. A railroad had negligently set one fire; the other fire was not set by the railroad and its origin was unknown. The landowner would have suffered the same devastating loss had the railroad not set its fire. The Supreme Court of Wisconsin held that the railroad was not liable.³⁸ Contrast this fire case with *Thompson v. Louisville & Nashville R.R.*,³⁹ an action brought for the wrongful death of a trainman seriously injured by the negligence of the railroad. Medical testimony tended to show that his injuries were mortal and that he had a short time to live. His wife mistook poison for medicine, and gave him a lethal dose. He died almost immediately, instead of lingering on for a few short hours. The wrongful death statute provided for liability only when negligent injury results in death. The appellate court held: the trial judge erred in charging the jury the railroad was not liable if the poison caused death. The court said, "If the wound was mortal, the person who inflicted it cannot shelter himself under the plea of a new, intervening cause. . . ."

In these multiple cause cases, the notion that actual causation is prerequisite to liability is a misleading nuisance. The central problem is: should the defendant be held to blame for the injury, even though, in some abstract sense, causal connection in fact may be lacking? Such issues are sometimes easy and sometimes hard. They raise problems involving the proper scope of liability; the facts are thoroughly understood from the point of view of physical occurrence; further concern with the cause-in-fact relationship will not move toward solutions. These problems do not differ significantly from the other problems dealt with under the heads of (1) the scope of duties, (2) the ambit of negligence, or (3) the legal proximity of an established cause-in-fact relationship. Defense counsel should be prepared to and permitted to

37. 98 Wis. 624, 74 N.W. 561 (1898).

38. Other courts have reached the opposite result in similar cases. See, e.g., *Anderson v. Minneapolis, St. P. & S.S. Ry.*, 146 Minn. 430, 179 N.W. 45 (1920).

39. 91 Ala. 496, 8 So. 406 (1890).

stress the lack of cause-consequence relationship. That lack is not totally irrelevant, for it bears on—but does not foreclose—the question of whether or not the defendant is to blame for the injury. What should be borne in mind is that liability can, and sometimes does, encompass harms which would have occurred even if the defendant had abstained from misconduct.

IX. DISTINGUISHING BETWEEN ACTUAL-CAUSE PROBLEMS AND OTHER SCOPE-OF-LIABILITY PROBLEMS

An advocate who has an actual cause problem usually knows with assurance that he needs proof of what happened; an advocate who has a scope of liability problem usually realizes that, once the facts are established, he will need arguments persuasive to judges and, perhaps, to jurors. Normally the difference between these two kinds of problems is so apparent that the chance of confusion is small.

There are at least two kinds of cases in which suspected unreliability of proof of cause in fact has affected the law on scope of liability: (1) pre-natal injury cases, and (2) cases in which bodily injuries have resulted from emotional disturbance.

Up to a few years ago all courts held that a child injured before birth had no cause of action against his injurer. Typical is *Magnolia Bottling Co. v. Jordon*,⁴⁰ in which the court justified such a holding on three grounds: (1) there were no precedents permitting such a recovery; (2) an unborn child has no legal personality and can therefore acquire no rights; and (3) courts are incapable of distinguishing between pre-natal injuries and congenital defects. All of these rationalizations have now been rejected by some courts; the third one is of particular interest in this discussion, for it is given in support of a rule of law that limits liability because courts cannot trust proof tending to show causal connection.

In 1946 a bold judge in *Bonbrest v. Kots*⁴¹ entered one of the first judgments repudiating the long established rule. He was not impressed with either the lack of precedents or the legal personality argument. But more important, he decided that proof of causation should be heard and weighed. This was simply a recognition, perhaps long overdue, of an advance made by medical science. In most of the cases tried since the *Bonbrest* case the courts have followed it. At least one court, however, has refused to go along and the law of Massachusetts remained unchanged in 1951.⁴²

40. 124 Tex. 347, 78 S.W.2d 944 (1935).

41. 65 F. Supp. 138 (1946).

42. *Bliss v. Passanesi*, 326 Mass. 461, 95 N.E.2d 206 (1950).

Even though a court is willing to try the actual cause issue in a pre-natal injury case, liability does not extend to all pre-natal injuries. Mr. Leafburner negligently sets fire to his neighbor's house; a fire engine en route to the fire collides with a butane truck; the truck explodes; violent concussion breaks a plate glass window a mile away; the glass falls on Mrs. Enceinte, injuring the child she carries. The court that decided the *Bonbrest* case removes the bar against proof that pre-natal injuries in fact result from wrongdoing; it does not extend liability to every pre-natal injury happening in consequence of misconduct.

A similar problem arose in cases in which physical injuries may have resulted from emotional disturbance. The early common law view prevailed in *Spade v. Lynn & Boston R.R.*,⁴³ in which a woman passenger was so frightened by the way a street car conductor handled a drunk that she suffered physical injury. One of the grounds on which the court justified a nonsuit was that liability "would open a wide door for unjust claims, which could not be successfully met." The courts feared that by faking physical injury, or falsely attributing it to emotional upset, plaintiffs might impose on courts and defendants.

For the last fifty years virtually all courts have held *intentional* wrongdoers liable for physical injuries resulting from conduct calculated to produce severe emotional upset. The classic case is *Wilkinson v. Downton*,⁴⁴ in which a practical joker with a perverted sense of humor told a woman that her husband had been seriously hurt. The "joke" brought on severe illness which resulted in permanent disability for which the joker was held liable.

Some courts have nibbled at the early common law rule with other exceptions. In Mississippi, for example, the court held an insurance company liable for aggravation of a man's illness which resulted from a claim adjuster's accusation of malingering. The court said that the rule does not apply when misconduct takes place in the plaintiff's home, where he was especially entitled to peace and quiet.⁴⁵ Five years after Massachusetts reaffirmed the early common law view in the *Spade* case, the court recognized a significant exception in *Homans v. Boston Elev. Ry.*⁴⁶ A negligent collision threw a passenger against the seat of a street car. The passenger was bruised and shocked and became paralyzed. The traction company's request for jury instructions to the effect that the passenger could not recover for paralysis unless it resulted from the physical impact was refused. The trial judge told the

43. 168 Mass. 285, 47 N.E. 88 (1897).

44. [1897] 2 K.B. 57.

45. *Continental Casualty Co. v. Garrett*, 173 Miss. 676, 161 So. 753 (1935).

46. 180 Mass. 456, 62 N.E. 737 (1902).

jury that the traction company should, under certain circumstances, be held for the paralysis even though it resulted from nervous shock rather than from the physical bump. This ruling was affirmed, and in an opinion written by Holmes the court approved of liability for physical injury resulting from emotional disturbance when that disturbance is contemporaneous with physical trauma, however slight. This view was followed by several other courts.

In some jurisdictions reform has been wide-sweeping—more like the reform in the pre-natal injury cases. In *Orlo v. Connecticut Co.*,⁴⁷ a motorist became seriously ill after a street car trolley wire dropped on the top of his car and he found himself sitting under a shower of electric sparks and a barrage of hissing. He offered no acceptable proof that he received an electric shock or any invasion of his skin. The trial judge instructed the jury over the motorist's objection that he could recover only if he suffered some physical invasion along with the emotional disturbance. The appellate court held the instruction wrong. Maltbie, C.J., said:

"Some of the reasons given for denying recovery, particularly in the older cases, have little if any weight now. One is the difficulty in tracing with any certainty the resulting injury back through the fright or nervous shock to the claimed negligent conduct. The steadily increasing advance in medical knowledge has tended to minimize this difficulty."⁴⁸

Now in Connecticut and many other jurisdictions liability for physical injuries produced by emotional disturbance and proximately resulting from misconduct is no longer specially limited.

But a defendant is not liable for every physical injury consequent to emotional disturbance induced by his misconduct. In *Waube v. Warrington*⁴⁹ a motorist ran over a little girl in the presence of her mother. The mother's dreadful experience produced severe physical illness which proved mortal. The suit was for the mother's death. The court refused to follow an English case in which the plaintiff recovered on virtually the same facts;⁵⁰ it held that the motorist owed the duty to drive carefully only to those more directly imperiled. This holding is not a return to the view that emotional stress in the chain of events connecting the defendant's wrong and that the plaintiff's physical injury is a link too weak for legal liability; it is merely a recognition that the usual methods of determining extent of liability are applicable to such cases.

47. 128 Conn. 231, 21 A.2d 402 (1941).

48. *Id.* at 236, 21 A.2d at 404.

49. 216 Wis. 603, 258 N.W. 497 (1935).

50. *Hambrook v. Stokes*, [1925] 1 K.B. 141.

In the pre-natal injury and emotional disturbance cases the courts clearly understood that they were dealing with cause-in-fact problems, even when they specially limited legal liability by refusing to try a cause-in-fact issue. But in some cases judges seem to have mistaken extent-of-liability problems for cause-in-fact problems. In *Geisen v. Luce*⁵¹ a passenger in a motor car was injured. The defendant had left his stalled car on a traveled portion of the highway. The car in which the plaintiff was riding approached the stalled car from the rear at a high rate of speed. The driver of the plaintiff's car did not have a clear view ahead, but nevertheless pulled out to pass the stalled car. A third car was approaching from the opposite direction. The plaintiff's host saw that a head-on collision was imminent and drove off the left side of the highway. The car upset and the plaintiff was injured. The court held for the defendant who had left the stalled car on the highway. The court properly enough analyzed the case as one in which the defendant was not negligent under the circumstances in leaving his car where he did, and went on properly enough to say that even if he were negligent his negligence was not the proximate cause of the plaintiff's injury. But then the court continued in this fashion: the accident would have happened even if the stalled car had been moving slowly; had it been moving slowly passing-time of overtaking cars would have increased and the danger to overtaking cars would have been prolonged; since slow movement of the stalled car would not have been unlawful, leaving it on the highway was not a cause-in-fact of the accident.

This reasoning is unsound. If the lawful slow travel of a car contributes in fact to a head-on collision between a passing car and a third car coming from the opposite direction, the slow traveler escapes liability because he is not negligent; he does not escape liability because his slow motion is not a cause of the accident. It does not follow that if a car left on the highway were not there it would be moving slowly; and if it were, a different case would be up for decision. The cause-in-fact relationship between leaving the car on the highway and the upset was not insufficient for liability. The sound basis for deciding this case for the defendant was not that the plaintiff's injury did not result from the presence of the stalled car. The sound basis was that the defendant excusably left the car there in the first place, and even if he were negligent in leaving the car there, the plaintiff's host's negligence so overshadowed his that the host alone should be held liable.

X. JUDGE AND JURY

A dispute on whether or not a plaintiff's loss is an actual consequence of a defendant's misconduct is a dispute of fact; it should be and

51. 185 Minn. 479, 242 N.W. 8 (1932).

usually is tried in the same way as other disputes of fact. If reasonable jurors could draw differing conclusions from the proof, the issue is submitted to the jury and decided by it. If reasonable jurors could come to but one conclusion, the litigant favored by that conclusion is entitled to a directed verdict if he asks for it. The defendant need not establish that the plaintiff's loss was not a consequence-in-fact of the defendant's conduct—the plaintiff has the burden of proof so the defendant is usually entitled to a directed verdict if reasonable jurors could not find that the plaintiff has affirmatively established the causal connection between the defendant's conduct and his loss.

Once the plaintiff has established that the defendant's misconduct in fact caused the plaintiff's injuries, should the jury play any part in determining whether the plaintiff's loss falls within the ambit of the defendant's legal responsibility? The quick answer to this question is yes and no; juries sometimes do and sometimes do not have the function of deciding whether the defendant who has, in fact, caused a loss should nevertheless escape liability for it. The only reliable guide to the allocation of this function (in arguable cases) is precedent closely in point.

Defendants' strategy. When proof tends to show either that the defendant's misconduct injured a person so situated that he was somewhat unlikely to have been injured by the defendant's kind of wrongdoing, or that the plaintiff's injury or the way it happened was somewhat unlikely, the defendant is almost sure to ask the trial judge to direct a verdict against the plaintiff. The defendant will ordinarily support his request with arguments to the effect that (1) he owed no duty of care to the plaintiff, or (2) he was not negligent toward the plaintiff, or (3) his misconduct was not the proximate cause of the plaintiff's loss.

Two different kinds of cases present different problems in advocacy:

(1) Cases in which the defendant relies on precedent or authority closely in point. Mr. Landowner excavates a hole near a public sidewalk and negligently fails to put up a railing sufficient to keep people from falling into it. Mr. Vicious intentionally shoves Mr. Pedestrian into this hole. Pedestrian sues Landowner for his consequent injuries and these facts are proved. Landowner moves for a directed verdict. In support of his motion Landowner can cite clear authority for the proposition that the jury should not be permitted to find against him. In the virtually identical cases of *Miller v. Bahmmuller*⁵² and *Alexander*

52. 124 App. Div. 558, 108 N.Y. Supp. 924 (2d Dep't 1908).

*v. Town of New Castle*⁵³ the courts held that the defendants were entitled to directed verdicts. In the case at bar Landowner's attorney's argument will be the sort that lawyers usually make when they have cases in point on an issue of law. In the absence of authority to the contrary Pedestrian's lawyer's chances are dim—though, of course, the law does change and courts do not always follow authority.

(2) Cases in which the defendant has no authority closely in point. Mr. Retailer negligently fails to pick up a banana peel dropped in an aisle in his store. Mrs. Shopper comes down the aisle under full sail, carrying a flat iron she had just bought; she slips on the banana peel and drops the flat iron; the iron lands on Mr. Customer's foot and injures him. Mr. Customer sues Retailer, proves these facts and rests. Retailer moves for a directed verdict. Suppose that defense counsel can find no cases closely in point; the favorable cases he can find involve only arguably similar facts; *e.g.*, *Wood v. Pennsylvania R.R.*,⁵⁴ in which the court held that a railroad was entitled to a directed verdict against a plaintiff-bystander who proved he was injured when struck by the body of X hurled against him by a train that negligently ran into X. This railroad case is relevant and convincing authority only if the general principle on which it was decided calls clearly for a directed verdict in the flat iron case. But earlier discussion has shown that principles which the courts purport to use do not dictate the decision of a novel scope of liability case, which by hypothesis our flat iron case is. An argument for a directed verdict based on traditional principles stated in the opinion of the railroad case or implicit in the holding of that case can be countered with an argument based on the same principles but reaching a contrary conclusion.

The flat iron case is one in which the dispute does not center on what happened; dispute centers on the legal consequences that follow from the described facts. In this sense it is not a dispute of fact; and courts emphasizing this point often hold that it is not a question for the jury. Nevertheless this kind of question is often submitted to juries. The situation is viewed by some courts as analogous to the trial of a negligence issue in which the facts of the defendant's behavior are not in dispute, but reasonable jurors could differ on whether the defendant acted with reasonable prudence. In such cases jurors are often asked whether or not the defendant was negligent. If the scope-of-liability problem in the flat iron case is viewed as a question of whether or not the Retailer's failure to pick up the banana peel was "a substantial factor in producing Customer's injury," or a question of whether

53. 115 Ind. 51, 17 N.E. 200 (1888).

54. 177 Pa. 306, 35 Atl. 699 (1896).

or not Customer's injury was a "natural and probable consequence of Retailer's negligence," some courts are likely to dub the issue one of fact on which reasonable jurors can differ, and hold that the issue should be decided by the jury. On the other hand, if the problem of the flat iron case is viewed as a question of whether or not Retailer violated a duty owed to Customer, the court is almost sure to hold that the responsibility for settling the issue is that of the trial judge, since determination of "the existence and scope of duties" has, by tradition, long been a judicial function. In some jurisdictions the duty approach is becoming increasingly popular, though in no jurisdiction is it universally used to solve scope-of-liability problems; in these jurisdictions the likelihood that a novel question of scope of liability will be settled by the judge, rather than by the jury, is relatively high. The likelihood is perhaps somewhat lower in jurisdictions where other forms of analysis are used; but in these jurisdictions the courts have often granted defendants' motions for directed verdicts.

Prophesying whether or not a court will direct a verdict for a defendant in an arguable scope-of-liability case is simply a special form of prophesying the outcome of that kind of case. Earlier discussion indicated the difficulties of knowing in advance how a novel case will be decided. In the absence of precedent closely in point prophecy cannot reach Delphic accuracy. Lawyers with experience and insight can estimate the likelihood that a particular judge will grant a defendant's motion for a directed verdict; but lawyers with experience also know that judicial temperament is most mercurial when judges deal with arguable scope-of-liability problems.

Plaintiffs' strategy. In theory a plaintiff too may be entitled to a trial judge's ruling in his favor on a scope-of-liability problem. As a practical matter plaintiffs' advocates are not likely to take advantage of this theoretical possibility; they are usually satisfied when the defendant's motion for a directed verdict is overruled and the jury is given an opportunity to decide in their favor. If the plaintiff's case is strong enough for a ruling on the scope-of-liability problem in his favor, the plaintiff has no fear that the jury will find against him on that issue. The likelihood of appellate reversal of a trial judge's ruling in the plaintiff's favor is usually much, much greater than the likelihood that the jury will find for the defendant. Tactical wisdom usually restrains plaintiffs from asking the trial judge to settle the issue by instruction.

XI. POLICY CONSIDERATIONS

In the kind of cases discussed in this article the misconduct of the defendants has been proved or assumed, and the usual policy justifica-

tions for basing liability on fault tend to justify taking money away from them. Compensable damages of the plaintiffs has also been proved or assumed, and the usual policy justifications for repairing the fortunes of those who suffer personal injuries or property damages tend to justify giving money to them. But in these scope-of-liability cases the court has an additional problem: granted that this defendant's conduct, viewed in isolation, is a kind of conduct that merits tort liability, and granted that this plaintiff's loss, viewed in isolation, is a kind of loss that merits tort recovery, would or would not judgment for the plaintiff extend the ambit of responsibility unwisely?

Some kinds of enterprise may disappear entirely or be pursued only by the financially irresponsible if they entail certain types of liability. In *Ultramares Corp. v. Touche*⁵⁵ the court decided that an accountant who negligently audits the books of a failing concern and prepares a statement showing that the concern is a good credit risk is not liable to creditors who extend credit in reliance on his audit. Cardozo, J. said:

"If liability for negligence exists, a thoughtless slip or blunder . . . may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."⁵⁶

Another example has a slightly different flavor. In *Stevenson v. East Ohio Gas Co.*⁵⁷ (in which the defendant who negligently set fire to a factory was held not liable for the wages lost by a workman while the factory was closed down for repairs), the court said: "the principal reason that has motivated the courts in denying recovery in this class of cases is that to permit recovery of damages in such cases would open the door to a mass of litigation which might well overwhelm the courts." Furthermore, the court feared that any attempt to go beyond the loss suffered by the manufacturer and compensate others hurt by the shut-down would carry liability to impossibly extreme lengths unless utterly arbitrary distinctions were drawn. The court said that the plaintiff's claim was not different from claims that might be made by those who contracted for the output of the factory, those who supplied raw material to the factory, those who operated neighborhood enterprises catering to the factory's hands, and so on. Though the court does not discuss the point, a modern development of social security, unemployment

55. 255 N.Y. 170, 174 N.E. 441 (1931).

56. *Id.* at 179, 174 N.E. at .

57. 47 Ohio L. Abs. 586, 73 N.E.2d 200 (1946).

insurance, has been designed to deal with the kind of loss this plaintiff suffered. The plaintiff's needs are no different from those of others suffering temporary unemployment, and his rights should not be significantly different from theirs. Certainly this possibility should give a court pause before it embarks upon a policy of recognizing a novel tort liability.

Most of the troublesome cases raise no such problems; most of the troublesome cases involve neither especially crushing liabilities, nor chains of losses extending through time and space, nor cases in which novel tort liabilities would duplicate the function of burgeoning social security plans. In *Gilman v. Noyes*⁵⁸ a trespasser left a stock raiser's pasture gate open; several sheep strayed and were eaten by bears. Even if the bears were licking their chops within the hour and even if the sheep were worth only a few dollars, the case would still involve a scope-of-liability problem. Why?

Deeply rooted in our culture is the postulate that a wrongdoer should pay for the wrong he does. That notion seems so natural and right that other alternatives seldom occur to us. An injury not caused by a wrongful act is an injury for which the wrongdoer has no legal responsibility. A scheme which allowed an injured person to seek reparation from wrongdoers who had nothing to do with his injury would seem to us arbitrary, disorderly and unworkable. Nor would we be happy with some system in which injuries and misdeeds were paired on a chance scheme of numbering, alphabetizing, or propinquity. Our general acceptance of the notion that the blame-*for* relation is usually the proper measure of the scope of responsibility is reflected in both (1) the usual requirement that the defendant's misconduct be a cause-in-fact of the plaintiff's injury, and (2) the limitation of liability to those consequences that seem appropriately attributable to the defendant. If the blame-*for* relation is our starting point, it is not unnatural that when the ordinary layman is uncertain about the existence of that relation the law, too, is infected with the same uncertainty. Decisions of cases tend to settle the law because of the tradition of stare decisis: when closely similar cases recur the courts are likely to do what they have done (particularly when they have no affirmative reason for doing otherwise). But this stabilizing force has not operated extensively because the queer case raises the problem, and cases that have recurred many times before seldom seem queer.

There have been, and there will probably continue to be, many cases in which the scope-of-liability problem can be decided for either litigant. Nevertheless the number of cases raising arguable scope-of-

58. 57 N.H. 627 (1876).

liability problems is insignificant when compared to the number of damage suits in which no such issue is disputed. The general run of tort liability will be relatively unaffected by the decision of scope-of-liability problems.

The beneficial effects of the law of torts as an instrument of social control and security are themselves limited; other institutions take up where the law of torts leaves off. That the legal boundaries of scope of liabilities should be fringed or vague seems inevitable; and in cases close to the boundary potent policy reasons seldom bear on the decision. Though text writers have often said that problems of scope of liability are at bottom problems of policy, they have thrown virtually no light on how these problems can be best solved to serve society. Only in the cases in which extended liability is disastrously severe or likely to inundate the courts in a flood of litigation have the courts used policy arguments to justify limitation of liability. When claims are for unspectacular sums, when liability threatens no deluge of litigation, when a novel case raises the question of whether a consequence is, or is not, too freakish to call for reparation from the wrongdoer whose misconduct caused it, little of profit can be said about policy considerations bearing on the proper solution. That prejudices and assumed social values of judge and jury may affect the results they reach is clear; but that a rational program of social betterment can be served by their solutions, or furnish guidance to the proper solutions, seems unlikely.